BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WILLIAM D. HARDS	)	
Claimant	)	
VS.	)	
	)	
JEFFERSON COUNTY	)	Docket No. 1,069,003
Respondent	)	
AND	)	
	)	
KANSAS WORKERS RISK COOPERATIVE FOR COUNTIES	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) appealed the June 11, 2014, Preliminary Hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders. Jan L. Fisher of Topeka, Kansas, appeared for claimant. Ronald J. Laskowski of Topeka, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 10, 2014, preliminary hearing and exhibits thereto; the transcript of the April 28, 2014, discovery deposition of claimant; and all pleadings in the administrative file.

ISSUES

Claimant alleges he sustained personal injury, a hernia, by repetitive trauma on January 18, 2013, arising out of and in the course of his employment with respondent. Respondent asserts claimant failed to prove he sustained personal injury by repetitive trauma and that claimant's work activities were the prevailing factor causing claimant's injury and need for medical treatment. Respondent alleges claimant sustained an incisional hernia that resulted from complications of a prior prostate surgery. Respondent also contends claimant failed to provide timely notice.

The ALJ found a preponderance of the medical evidence supports a conclusion the prevailing factor for claimant's hernia was his work activities. The ALJ implied claimant's date of injury was January 18, 2013, and found claimant provided timely notice on February 4, 2013.

The issues on appeal are:

1. Did claimant provide timely notice?

2. Did claimant sustain personal injury by accident or repetitive trauma on January 18, 2013, arising out of and in the course of his employment with respondent?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant's Application for Hearing alleged he sustained injury to the groin, stomach and body in approximately January 2013 while lifting tree limbs weighing approximately 75 to 100 pounds and placing them in a chipper. Shortly after claimant was deposed on April 28, 2014, claimant filed an amended Application for Hearing, alleging injury by a series of microtraumas culminating on or about January 18, 2013, while performing heavy work including lifting tree limbs, trimming trees and cutting weeds.

At his deposition, claimant testified he thought he was injured around January 18, 2013. He had been cutting brush for several weeks for respondent, beginning in December 2012. Claimant testified:

> Q. Now, you told me that you were cutting brush for several weeks, do you recall any specific incident or maneuver that you did that you noticed the onset of this lump in your right side of your stomach?
>
> A. No. Like I say, I never really noticed it until like, you know, at home when I was taking a shower and stuff like that, I was like what the heck and that.
>
> Q. So you first noticed it when you were taking a shower at home?
>
> A. Yeah.
>
> Q. You noticed some abnormality on the right side of your abdomen; is that correct?

> A. Right. Because I -- like I say I'd had my prostate surgery before and it was off to the right of the incision.[1]

At first, claimant thought the lump had something to do with his prostate surgery he had in April 2012 at the Veterans Administration (VA), so he set up an appointment with the VA in Kansas City. Claimant testified he was told by the VA he had a hernia. Claimant indicated he had no bowel or stomach issues associated with the prostate surgery.

Claimant testified he reported the injury on January 18, 2013, or a couple of days later when he showed the lump to his boss, Francis Hubbard. A secretary helped claimant complete an accident report. Claimant indicated he felt no sensation, pain or abnormal feeling in his abdomen or groin while cutting brush in December 2012 or January 2013. He testified he could not recall a specific date he injured himself. A few days after the report was completed, respondent sent claimant to a doctor in Lawrence, who diagnosed claimant with a hernia.

Claimant testified he underwent a hernia repair surgery by Dr. Stephen W. Myrick on February 25, 2013. A second surgery was performed by Dr. Myrick's partner, Dr. Cheryl A. Rice, on March 9, 2013, for a small bowel obstruction and possible infected seroma. Claimant indicated he had two infections and had to be placed on a wound vac twice. Claimant had problems with his stomach and reported it to Dr. Myrick. According to claimant, Dr. Myrick indicated claimant was fine and was at 100%. Claimant was released without restrictions on June 4, 2013.

Claimant continued to have problems. Claimant indicated he used his unauthorized medical to see Dr. Kamath at the VA, who ordered x-rays. The x-rays, which claimant believed were taken on August 15 or 16, 2013, revealed a bowel obstruction. Claimant testified the VA called him and told him he needed emergency treatment for the bowel obstruction. He was admitted to the VA where he was treated and remained for a week, but did not undergo surgery. Claimant testified that on approximately August 26, he again began having stomach problems and was taken to the VA in Topeka, which transferred him to Stormont-Vail in Topeka, where he was treated non-surgically and remained for a week. Claimant indicated he continued having stomach issues and eventually underwent surgery at the University of Kansas Medical Center in December 2013, because his stomach was upside down. In February 2014, claimant underwent a fourth surgery by Dr. Bradley K. Woods because of a bowel obstruction.

An operative report from the VA[2] indicated claimant underwent prostate surgery on April 20, 2012. The incision was made on the midline from the pubic bone to an area

---

[1] Claimant Depo. at 17.

[2] P.H. Trans., Cl. Ex. 8.

inferior to the umbilicus. A December 13, 2012, medical note from the VA indicated claimant seemed to be doing well and stated he was improving.

Dr. Myrick first examined claimant on February 8, 2013, and diagnosed claimant with an incisional hernia. The doctor's records indicate claimant was referred to him by Dr. Michael Geist, who had placed claimant on light duty. Dr. Geist's records were not placed into evidence. Dr. Myrick's notes indicated claimant had a low midline incision present from below the umbilicus to the pubis and there was complete disruption of the fascial closure with a 12 cm or so fascial defect. The doctor noted there was no evidence of a supraumbilical hernia. Dr. Myrick's February 2013 operative report stated, in part: "Operative findings – the fascia was extremely poor and attenuated. The entire low midline incision was encompassed by this defect."[3]

Notes from claimant's visit to the VA in February 2013 were not placed into evidence. An April 25, 2013, VA note of Dr. Felipe Rosso indicated claimant developed a ventral hernia at the site of his lower midline incision, and that claimant reported he did a significant amount of strenuous activity at work and one day felt a painful pop.

At the request of his attorney, claimant was evaluated by Dr. Daniel D. Zimmerman on May 8, 2014. After physically examining claimant, reviewing his medical records and taking a history, the doctor diagnosed claimant with an abdominal wall hernia. Dr. Zimmerman opined the prevailing factor for claimant's abdominal wall hernia was the repetitive work duties he performed at respondent through January 18, 2013.

At respondent's request, Dr. Lawrence J. Drahota reviewed claimant's medical records, but did not see claimant. Dr. Drahota's letter to respondent's counsel indicates Dr. Drahota also reviewed depositions, but the doctor does not list the transcripts or the medical records he reviewed. Dr. Drahota's letterhead indicates the doctor performs general, laproscopic, endocrine, bariatric and breast surgery. The doctor noted there were several factors that would cause claimant's hernia to naturally occur after his midline abdominal prostate surgery: smoking, cancer, obesity and COPD. Dr. Drahota also noted there was no exact moment claimant felt pain or tearing. The doctor opined claimant's work activity was not the prevailing factor causing claimant's incisional hernia, medical treatment and disability.

Claimant's testimony at the preliminary hearing was similar to his deposition testimony. He testified his job regularly required him to lift between 50 and 100 pounds and the task of cutting brush required repetitive bending. He noticed the lump, which was two inches to the right of his prostate surgery incision, nine months after his prostate surgery. He indicated that when he was cutting brush, he never stopped working because of any symptoms or problems. Claimant testified that after returning to work following his

[3] *Id.*, Resp. Ex. B.

prostate surgery, he was able to perform his regular work duties. Nor did he have any complications after his prostate surgery. Claimant testified he was never told by the VA his hernia was work related. Claimant indicated he underwent a fifth surgery on May 22, 2014, for a massive abdominal hernia.

A case manager sent Dr. Woods a letter dated February 24, 2014, asking him to answer two questions. Dr. Woods answered in the negative to whether the surgery he performed was directly related to claimant's February 2013 hernia surgeries. He also answered no when asked if claimant's hernia surgeries in February 2013 led to claimant's bowel obstruction and need for the surgery Dr. Woods performed.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[4] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[5]

K.S.A. 2012 Supp. 44-508 states, in part:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
>
> (e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
>
> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
>
> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

---

[4] K.S.A. 2012 Supp. 44-501b(c).

[5] K.S.A. 2012 Supp. 44-508(h).

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2012 Supp. 44-520(a) states:

(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

Respondent asserts claimant amended his application for hearing from a traumatic accident to a repetitive injury because he could not identify by time, date and place of occurrence that he developed symptoms of an injury during a single work shift. Claimant's uncontroverted testimony was that he first noticed a lump in his abdomen on or about

January 18, 2013, after repetitively cutting brush for several weeks. This Board Member finds that if claimant's hernia was work related, it was likely the result of repetitive trauma because claimant could not identify a specific date or time when he sustained a hernia.

The ALJ impliedly found January 18, 2013, was the date of claimant's injury by repetitive trauma. This Board Member disagrees, as none of the triggering events set forth in K.S.A. 2012 Supp. 44-508(e) occurred on January 18, 2013. Dr. Geist restricted claimant to light duty sometime after claimant reported the injury on or about January 18, 2013, and prior to the date claimant saw Dr. Myrick on February 8, 2013. Under K.S.A. 2012 Supp. 44-508(e), that is the first triggering event that determines claimant's date of injury. Claimant notified his employer of the hernia on or about January 18, 2013, and again on February 4, 2013, when the accident report was completed. Notice given on either date was timely under K.S.A. 2012 Supp. 44-520(a).

Respondent argues claimant failed to provide adequate notice as to time, place and particulars of the work injury. This argument is based on the fact claimant showed the lump in his abdomen to his supervisor, who told claimant the lump might be a hernia. However, that theory ignores the accident report completed on February 4, 2013, by respondent's office manager with information provided by claimant. The accident report was completed within the notice period set forth in K.S.A. 2012 Supp. 44-520(a), and contains the date of injury, the place of occurrence and particulars of the injury. The undersigned Board Member finds claimant provided timely notice of his injury by repetitive trauma.

The next issue is whether claimant sustained personal injury by repetitive trauma arising out of and in the course of his employment with respondent. Respondent asserts claimant failed to prove his work activities caused his hernia. Prior to noticing the lump in his abdomen, claimant had no pain or discomfort. Claimant would have the Board assume that because he performed repetitive work activities, his hernia resulted from those work activities. This Board Member disagrees, as there is insufficient evidence in the record to show a causal connection between claimant's work activities and his hernia.

Respondent next asserts that if claimant's hernia was work related, he aggravated a preexisting condition and his work activities were not the prevailing factor causing his hernia and need for medical treatment. Claimant cites an order where a Board Member found that a preexisting but asymptomatic spondylolisthesis that was made unstable and symptomatic as the result of a traumatic accident was compensable, as there was a change in structure to the spondylolisthesis. Claimant argues not all aggravations are non-compensable, and cites K.S.A. 2012 Supp. 44-508(f)(2).

Neither Dr. Zimmerman nor Dr. Drahota's reports are particularly insightful. Dr. Zimmerman indicated Dr. Myrick repaired claimant's incisional hernia, but then opined claimant had an abdominal wall hernia. Dr. Zimmerman ignored Dr. Myrick's statements that claimant had complete disruption of the fascial closure with a 12 cm or so fascial

defect. Dr. Drahota did not examine claimant and his report does not specify the medical records he reviewed. This Board Member is mindful that Dr. Zimmerman was hired by claimant and Dr. Drahota by respondent, and their opinions may be biased.

The lump claimant noticed was just two inches from his prostate incision. Claimant initially thought the lump might be related to his prostate surgery. Dr. Myrick's notes indicated he repaired an incisional hernia and claimant had a complete disruption of the fascial closure with a 12-cm defect. The doctor's statement that the entire low midline incision was encompassed by a fascial defect is compelling. The April 2013 VA note of Dr. Rosso indicated claimant developed a ventral hernia at the site of his lower midline incision. The answers Dr. Woods gave to questions posed to him by the case manager call into question whether claimant's bowel obstructions were related to his hernia surgeries.

This Board Member finds claimant failed to prove he met with personal injury by repetitive trauma arising out of and in the course of his employment with respondent. Drs. Myrick and Rosso, two of claimant's treating physicians, were not asked to provide prevailing factor opinions, nor did they specifically state claimant's hernia was caused by or aggravated his prostate incision. Nevertheless, the medical records of Drs. Myrick and Rosso convince this Board Member that claimant's work activities were not the prevailing factor causing his hernia and need for medical treatment.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[7]

WHEREFORE, the undersigned Board Member reverses the June 11, 2014, Preliminary Hearing Order entered by ALJ Sanders.

IT IS SO ORDERED.

---

[6] K.S.A. 2013 Supp. 44-534a.

[7] K.S.A. 2013 Supp. 44-555c(j).

Dated this ____ day of August, 2014.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
janfisher@mcwala.com

Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Ron@LaskowskiLaw.com; kristi@LaskowskiLaw.com

Honorable Rebecca Sanders, Administrative Law Judge